

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 22, 2007 Session

**DEBORAH R. WAGNER v. WASHINGTON COUNTY DEPARTMENT OF
EDUCATION and TENNESSEE SCHOOL BOARD ASSOCIATION**

**Direct Appeal from the Circuit Court for Washington County
No. 8728 Thomas J. Seely, Jr., Judge**

Filed April 3, 2008

No. E2007-00868-WC-R3-WC Mailed January 11, 2008

This appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) (2005 & Supp. 2007). Employee alleged that she had sustained a permanent disability as a result of exposure to mold at her place of work. The trial court found in her favor and awarded benefits for 35% permanent partial disability to the body as a whole. Employer has appealed, contending that the trial court erred by finding that Employee had sustained a permanent injury or contracted an occupational disease, by finding that her condition was permanent, and by awarding an impairment rating in conflict with the AMA Guidelines. Because the evidence preponderates against the finding that Employee sustained a compensable injury or contracted an occupational disease, the judgment of the trial court is reversed.

**Tenn. Code Ann. § 50-6-225(e) (2005 & Supp. 2007) Appeal as of Right; Judgment of the
Circuit Court Reversed**

GARY R. WADE, J., delivered the opinion of the court, in which TELFORD E. FORGETY, SP. J., and BEN W. HOOPER, II, SP. J., joined.

Bradley E. Griffith, Johnson City, Tennessee, for the appellants, Washington County Department of Education and Tennessee School Board Association.

Angela Vincent Jones, Johnson City, Tennessee, for the appellee, Deborah R. Wagner.

MEMORANDUM OPINION

Factual and Procedural Background

Deborah Wagner (“Employee”) was a school teacher for the Washington County Department of Education (“Employer”) from 1982 until 2003. She taught mathematics at Gray Middle School. Age 46 at the time of trial, Employee had bachelor and masters degrees in education. In this workers’ compensation action, she alleged that she sustained a permanent disability as a result of exposure to mold in the workplace. She claimed that her allergies prevented her from engaging in aerobics, going to the movies, and, for the most part, shopping at the grocery store. She testified that she was unable to go to the mall, and that she had not been to Wal-Mart in four years.

At some time before October 2002, Employee began to experience hoarseness in her throat, and by October 18 of that year, she had lost her voice completely. She claimed that her symptoms persisted even after she consulted her primary care doctor. She asserted that her condition seemed to worsen when she was at school and improved when she was anywhere else.

When, in January 2003, she was referred to Dr. Neal Wallen, an allergist/immunologist, Employee complained that she had actually seen mold “in her work environment.” A skin test taken at that time indicated Employee had allergies to house dust mites, cat hair, dog dander, and various types of pollen; however, the test results for allergy to mold spores was negative. Dr. Wallen prescribed medication and, after two weeks of treatment, released Employee to return to work. Upon her return, she was moved to a classroom in a newer part of the building. Her symptoms did not improve and she left Gray Middle within a short period of time. During the following months, Employer placed Employee at a number of other schools in an effort to help her relieve her from her symptoms, but she claimed to experience the same reaction at each location. She did not work for more than four days at any of those schools and contended that simply being in the presence of anyone who worked at Gray Middle caused her an allergic reaction.

Employee’s husband, Rick Wagner (“Husband”), was also a teacher at Gray Middle. When her symptoms worsened in his presence, Employee concluded that he was transporting mold spores from the school and moved temporarily to her parents’ residence, which was nearby. After Employee’s departure from her home, Husband cleaned the residence and all of its contents with a bleach solution and employed a professional service to cleanse the air ducts and vents. Husband asked for and received a transfer to a different school. Thereafter, Employee felt comfortable with returning to the residence.

Early in 2003, Employee underwent pulmonary function testing. The results were normal. A few months later, a blood test to determine whether she had been exposed to mold also had negative results. Even later, a second blood test produced the same result.

In June of 2003, Employee consulted Dr. Eckardt Johanning, an occupational environmental physician from Albany, New York. In November of the same year, Dr. Johanning ordered a “methacholine challenge test,” which revealed that Employee had asthma. In April 2004, almost a year after the first, she had a third blood test. Unlike the previous tests, this test was positive for exposure to three types of mold known to be allergens – *penicillium*, *aspergillus*, and *altarnia*. At

the suggestion of Dr. Johanning, Employee arranged for her house to be tested for mold in June of 2004.

Environmental scientist Jimmy Wingfield performed tests on the Wagner residence by using a device which trapped mold and other particles in an air filter. Samples were taken outside the residence and in the living room and the master bedroom. The outside sample contained 9328 mold spores per cubic meter. The living room sample contained 266 spores per cubic meter, and the master bedroom sample contained 77 spores per cubic meter. *Penicillium*, *aspergillus*, and *altarnia* spores were found in the indoor samples, but not in the outdoor sample. Upon receiving the written report, Husband asked Wingfield to delete the section concerning the presence of the three allergenic spores in the residence. Wingfield complied with the request.

At approximately the same time, Employer contracted with Wingfield to test for mold at Gray Middle. Apparently, neither Employer nor Employee was aware that the other had hired Wingfield to perform the tests. A sample taken outside the school contained 5936 mold spores per cubic meter, substantially less than the count outside Employee's residence. A sample taken in Employee's former classroom contained 26 spores per cubic meter, less than 10% of that in Employee's residence, and samples from other areas in the school contained between 13 and 52 spores per cubic meter. The tests indicated that none of the molds known to be allergens were present at the school.

Dr. Wallen, who testified by deposition, treated Employee for two years between 2003 and 2005. His final diagnosis was that Employee had allergic rhinitis due to an allergy to house dust mites. Although he did not find that she had mold allergies, he pointed out that mites are commonly found in moldy indoor environments. It was his opinion that Employee's allergy was a pre-existing condition, which had not been caused by her work environment. He stated that "[Employee] did not have allergic rhinitis because she worked at Gray, but . . . because she had allergic rhinitis[,] she had problems working at Gray." He opined that "a component of [Employee's] symptoms [were] due to panic." Based upon Employee's complaints, Dr. Wallen concluded that she had been exposed to a high level of dust mites at the school, which had aggravated her pre-existing allergy. Based upon the results of a methacoline challenge test performed by Dr. Johanning, Dr. Wallen also opined that Employee had mild asthma. He did not believe the asthma was caused by her job and recommended that she avoid environments with "high levels of things she is allergic to."

The evidence included three depositions from Dr. Johanning and approximately 500 pages of medical records. In his first deposition in 2004, Dr. Johanning opined that Employee had "occupational asthma, allergy to molds and bacteria as a result of exposure to indoor moisture and microcontamination." He stated that the Wingfield tests (those that had been redacted), upon which he relied, indicated that the Wagner residence was not the source of exposure. He testified that the method used by Wingfield to test the residence was appropriate and determined that his results were valid. He also examined a number of photographs taken by Husband at Gray Middle. These photos, taken by Husband, showed water stains on ceiling tiles and black dust on what appear to be air vents. Based upon the complaints of Employee and the photographs, Dr. Johanning opined that Employee's condition was the result of exposure to mold in the workplace. He assigned a permanent anatomical

impairment of 15% to the body as a whole, based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. It was his opinion that Employee could not return to work at Gray Middle, but he did think she could return to teaching in a “clean, well ventilated environment”

Dr. Johanning’s second deposition, taken July 18, 2006, was for cross-examination purposes. In a C-32 report by Employee, Employer discovered that Dr. Johanning had revised his impairment rating to 30%-50% to the body as a whole. He testified that he “considered” the AMA Guides in his revised impairment rating, but admitted that he did not use any specific protocol or table from the Guides in doing so. Since his first deposition, he had seen Employee on two additional occasions. She reported “recurrent episodes of significant respiratory impairment . . .” occurring at a basketball game, a hotel or motel, and a store. The record does not indicate whether Dr. Johanning thought these episodes had worsened her health or were merely illustrations of the effect of her condition.

On November 22, 2006, Dr. Johanning provided a third deposition. After receiving Wingfield’s report from mold testing at Gray Middle, indicating lower levels of mold spores than in the non-redacted version of tests at the Wagner residence and no allergenic mold, Dr. Johanning expressed several reservations about the expert’s findings. He first stated that Wingfield was not a certified industrial hygienist. He also expressed concern that the report did not contain a sampling methodology description, included too few samples, and involved a device (Air-O-Cell) that had been introduced into the market only two years before. He could not, therefore, “make a general health conclusion based just on that test.” When questioned, Dr. Johanning stated that he did not recall his testimony during the first deposition that Wingfield’s testing procedure and report on the Wagner residence were valid and adequate.

The two-day trial, held on separate dates in October of 2006 and March of 2007, included the testimony of John Maddux, a private investigator hired by Employer. Maddux, who had conducted surveillance of Employee over a five hour period on December 9, 2006, observed her attending a children’s basketball game at a school in Johnson City. Afterward, he followed her as she drove to East Tennessee State University to attend a collegiate basketball game and then to a supermarket where she purchased some grocery items. Maddux, who made a video recording of his surveillance, testified that Employee did not appear to experience any health problems during the entire period of time.

The trial court expressed reservations about the testimony of both Employee and Husband, but did not make specific findings regarding their credibility. Concluding that the testimony of Dr. Wallen was more persuasive than that of Dr. Johanning, the trial court determined that Employee’s “condition was . . . aggravated by her employment” and awarded 35% disability to the body as a whole.

In this appeal, Employer contends the trial court erred by finding that Employee sustained an injury or occupational disease as a result of her employment. Employer also argues that the trial court erred by finding that Employee’s condition was permanent and by basing its award of

permanent partial disability benefits on the impairment rating by Dr. Johanning.

Standard of Review

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2005 & Supp. 2007). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987). This Court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. Landers v. Fireman's Fund Ins. Co., 775 S.W.2d 355, 356 (Tenn. 1989). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Ridings v. Ralph M. Parsons Co., 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

1. Causation

Throughout the record, there are references to Employee's "injury or occupational disease." No distinction was made between the two terms. On appeal, Employer contends that the evidence preponderates against the judgment whether Employee's condition was from an injury or an occupational disease. See Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 680 (Tenn. 2005) (stating that there is overlap between an injury and an occupational disease).

In a workers' compensation case, the causal relationship between the employment and the injury must be proven by the preponderance of the expert medical testimony, as supplemented by the lay evidence. The proof of the causal connection may not be speculative, conjectural, or uncertain. Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn. 2004); Simpson v. H.D. Lee Co., 793 S.W.2d 929, 931 (Tenn. 1990); Tindall v. Waring Park Ass'n, 725 S.W.2d 935, 937 (Tenn. 1987). Absolute certainty with respect to causation is not required, however, and in many cases, expert opinions in this area contain an element of uncertainty and speculation. Fritts, 163 S.W.3d at 678. Any reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the Employee. Phillips v. A&H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004). Nonetheless, the employee bears the burden of proving each element of his claim. King v. Jones Truck Lines, 814 S.W.2d 23, 25 (Tenn. 1991).

Tennessee Code Annotated section 50-6-301 establishes the required elements for proving an occupational disease. These include, among other things, that the disease "can be determined to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment" and also that "[i]t has not originated from a hazard to which workers would have been equally exposed outside of the employment." Tenn. Code Ann. § 50-6-301(1), (3) (2005).

Employer's primary contention is that Employee failed to prove that she was exposed to any injurious agent at Gray Middle. In that regard, the medical testimony sets out two possible scenarios. First, Dr. Johanning expressed the opinion that Employee suffered from occupational asthma, which was caused by exposure to mold at the school. Secondly, Dr. Wallen believed that she had a pre-existing allergy which was triggered by exposure to house dust mites at the school. Employer submits that Employee cannot recover because the record does not demonstrate that she was exposed to either mold or dust mites at the school.

Employer asserts that the physicians based their opinions almost entirely on Employee's descriptions of the conditions at the school and her claims that she became ill while there but not while at home. It is only from those reports, Employer argues, that each doctor inferred the presence of mold or mites at the school. Employer points out that the only actual data on the subject was supplied by Wingfield, and submits that his tests indicated the presence of a significantly lower level of mold in the school than in Employee's residence. Employer also submits that both Dr. Johanning and Wingfield testified that mold could not be identified from photographs. As final assertion, Employer attacks the credibility of Employee, from the redacted version of the Wingfield report regarding the mold in the Wagner residence to contradictions in her testimony and the results of the surveillance.

Employee responds by noting that neither Dr. Johanning nor Dr. Wallen changed their opinion when confronted with the full Wingfield report. Employee also insists that the HVAC system at the school had been improved between the time of her departure and the Wingfield tests.

As stated, our review of deposition testimony is de novo. Our independent assessment is that Dr. Johanning's testimony was unconvincing for several reasons. He found Wingfield's credentials and methods to be reliable when the results supported his opinion, but unreliable when they did not. Moreover, he was unable to provide an adequate explanation for the substantial increase in his assessment of Employee's impairment between November 2004 and July 2006. The trial court's description of his testimony as "defensive" is fair. In addition, several of his conclusions were based primarily upon incomplete or questionable information provided by Employee and Husband.

The testimony of Dr. Wallen appears more credible, even though he determined that Employee had an allergy to dust mites rather than mold. The Wingfield tests showed far less mold inside Gray Middle than inside Employee's residence. Mold was also present in greater quantities outside the Wagner house than outside the school. Moreover, the first blood test that was positive for mold exposure occurred in April 2004, over a year after her departure from the school. Finally, that test indicated that Employee had been exposed to three toxic molds, all of which were in the Wagner residence, but none of which were in the school.

There were defects in the testing methods. The sampling took place over a year after Employee had left the school. There had apparently been changes in the school's HVAC system after her departure but before administration of the tests. Finally, Wingfield tested only a limited number of spaces at the school. Nevertheless, the test results qualify as the most objective evidence

in the record and overcome the Employee's subjective contention that allergens were more prevalent at Gray Middle than in her own residence.

Husband's photographs of the school are of negligible value. While they depict some substances, both Dr. Wallen and Dr. Johanning confirmed that the presence of mold cannot be determined by the examination of photographs. Indeed, Employee and Husband also testified that mold was present at Gray Middle. Neither, however, had any specialized knowledge of mold and neither could identify whether the substance, if a mold, was of the type that could trigger an allergic reaction. In our view, the trial court raised valid concerns regarding the credibility of the testimony of Employee and Husband. There were significant discrepancies between her claimed disabilities and the surveillance results. Husband's conduct regarding the redaction of the Wingfield report was not helpful to the cause of Employee.

Finally, the record contains no evidence that mold was present at the various other schools at which Employee worked. Likewise, there was no testimony whatsoever that indicated the presence of dust mites, as Dr. Wallen theorized, at Gray Middle. Thus, Employee has not put forth sufficient evidence to prove that her maladies "followed as a natural incident of the work as a result of exposure occasioned by the employment." Nor has she demonstrated as required, that her medical problems did "not originate[] from a hazard to which [she] would have been equally exposed outside of the employment." See Tenn. Code Ann. § 50-6-301 (1), (3). Stated differently, she has failed to prove that she was exposed to allergens at her school, which might have either caused her asthma or aggravated any pre-existing allergies.

Based upon the foregoing, it is our conclusion that the evidence preponderates against the trial court's finding that Employee sustained a compensable injury or contracted an occupational disease as a result of her employment. We therefore reverse the judgment of the trial court and dismiss the complaint.

Conclusion

The judgment of the trial court is reversed and the complaint is dismissed. Costs are taxed to Employee, Deborah R. Wagner, for which execution may issue if necessary.

GARY R. WADE, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

**DEBORAH R. WAGNER v. WASHINGTON COUNTY DEPARTMENT
OF EDUCATION AND TENNESSEE SCHOOL BOARD ASSOCIATION**

**Circuit Court for Washington County
No. 8728**

Filed April 3, 2008

No. E2007-00868-SC-WCM-WC

ORDER

This case is before the Court upon the motion for review filed by Deborah R. Wagner pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Deborah R. Wagner, for which execution may issue if necessary.

PER CURIAM

Wade, J. - Not Participating

APRIL 2, 2008

TO: ANNE BRUSH, DEPUTY CLERK, KNOXVILLE
FROM: WILLIAM M. BARKER, CHIEF JUSTICE
RE: DEBORAH R. WAGNER V. WASHINGTON COUNTY BOARD
OF EDUCATION, ET AL. - WASHINGTON CIRCUIT
NO. E2007-00868-SC-WCM-WC
CC: JANICE RAWLS, NASHVILLE CLERK'S OFFICE

MOTION FOR FULL-COURT REVIEW::

DENIED

RELEASE DATE:

NEXT AVAILABLE DATE